In the

United States Circuit Court of Appeals

For the Ninth Circuit

No. 3918

THE PRUDENTIAL INSURANCE COMPANY OF AMERICA, A CORPORATION, AND MUTUAL LIFE INSURANCE COMPANY OF NEW YORK, A CORPORATION, PLAINTIFFS IN ERROR

— VS —

MAUDE E. STEWART, DEFENDANT IN ERROR

Upon Writs of Error to the United States District Court of the Western District of Washington, Southern Division

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BRIEF OF DEFENDANT IN ERROR

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STATEMENT

The statement of the case made in the brief of the plaintiffs in error is so confused, inaccurate and in certain respects so misleading that we challenge

its correctness and herewith submit a statement of our own, which we claim the record will in all particulars substantiate.

On August 17, 1915, August 7, 1916, and April 17, 1917, the Prudential Insurance Company, one of the plaintiffs in error, in consideration of a stated premium, to be paid yearly, issued its three certain policies of life insurance for $5,000, $25,000, and $5,000, respectively, wherein and whereby it agreed upon the death of Frederick L. Stewart, the insured, to pay to Maude E. Stewart, the defendant in error, then the wife and now the widow of the insured, the amounts denominated in the policies.

On July 15, 1915, and July 28, 1915, the Mutual Life Insurance Company of New York, the other plaintiff in error, in consideration of a yearly premium to be paid to it as specified in the policies, issued to the said Frederick L. Stewart its two certain policies of life insurance for $5,000 each, to be paid to Mrs. Stewart upon the death of the insured.

On March 17, 1921, these policies were in full force and effect, no default in the payment of premiums having occurred.

At the time of the issuance of these policies of insurance the insured, Frederick L. Stewart, was and for some time prior thereto had been the cashier

Defendant's Exhibit "T," duplicate of Exhibits marked Exhibits "A," San Diego, Exhibit "I," S. C.

of the Kelso State Bank, a banking corporation, organized and existing under and by virtue of the laws of the state of Washington, which position he continued to hold until the date of his death.

Mr. Stewart was on March 17 1921, of the age of forty-nine years. He was about six feet in height, complexion fair, blue eyes, brown hair, slender build, weight about one hundred and sixty pounds. He was of a type common to many. Perhaps the most noticeable thing about him were his upper teeth, which with the exception of the three front ones were all crowned with gold. Dr. Barnard, his dentist, testified that:

"The bicuspids and the front teeth were exceptionally long. Mr. Stewart had a medium sized mouth, but his lips were very thin. When he was talking or laughing or even in ordinary conversation the first thing you would notice were his teeth." (318, 350, 336.)

In 1908 and 1909, Mr. Stewart was possessed of an exceedingly heavy head of hair, which was quite wavy and curly. On the opposite page we reproduce a photograph (defendants' Exhibit "T") of Mr. Stewart, that was taken prior to his marriage sometime in 1909. (This is the photograph that was exhibited to the witnesses for the insurance companies, whose depositions were taken at Han-

ford, San Francisco, Riverside, and San Diego, California, and not the photograph (Pltffs' Ex. 36) reproduced in the brief of counsel for plaintiffs in error. Why they omitted to reproduce this photograph (Deft's Ex. "T") we do not understand. However, we do not want this court to get the impression that it was the photograph reproduced in the brief of the plaintiffs in error that was exhibited to the witnesses whose depositions were taken at the places referred to.) The ravages of time, however, played rather sad havoc with the thick head of hair that Mr. Stewart possessed in 1909, and in 1920 he had lost a considerable portion of the same. On another page we reproduce a photograph (Pltffs' Ex. 36) of Mr. Stewart that was taken in September of 1920. (315.) The undisputed testimony, as well as the latter photograph (Pltffs' Ex 36), disclose that for some years prior to March 17, 1921, Mr. Stewart had not only lost a large portion of the hair that he possessed in 1909, but that he had ceased to wear his hair in the style or manner disclosed in the old photograph (Deft's Ex. "T"), taken in 1908 or 1909, and that in 1920 and 1921, and for years prior thereto he had worn his hair in what barbers term "pompadour style." Many of his friends and business associates so testified. (318, 336, 350.)

Plaintiff's Exhibit 36. This photo taken in 1920.

Henry J. Asbury, a barber of thirty-two years' experience, says

"I have often cut hair in pompadour style. I recognize defendant's San Diego Exhibit 1 (duplicates of defendant's exhibit "T"). That photograph shows the style in which Mr. Stewart wore his hair when he served in the State Senate. Assuming that the man in the photo (Pltffs' Ex. 36) had worn his hair in pompadour style for seven or eight years I don't think from the thinness of his hair that he could ever get it back in the style shown in defendant's San Diego Exhibit 1." (340.)

(San Diego Exhibit "I" is a duplicate of defendant's exhibit "T").

We have set down the foregoing undisputed facts to the end that this court may more readily understand and assimilate what is to follow.

On March 17, 1921, between the hours of 8:50 and 9:15 p. m., Mr. Stewart, the insured, met his death, so we claim, by being drowned in the waters of the Columbia River. The insurance companies were immediately notified of his death and afterwards were furnished with proofs of death, but they denied all liability, claiming that Mr. Stewart is still alive. Separate actions were thereafter instituted to recover on the policies, and when the issues were joined a stipulation was en-

tered into consolidating the separate actions and waiving a trial by jury, and consenting that the consolidated action be tried to the court. (34, 35, 36, 37.)

The trial in the lower court was commenced on April 4, 1922, ending April 11, 1922, at the conclusion of which Judge Cushman promptly directed that judgment be entered in favor of the plaintiff for the full amount sued for. Findings of fact were filed, only two of which were excepted to. In the eighth finding of fact in the Mutual Life Insurance Company case and in the tenth finding of fact in the Prudential case, it was found by the court that on the 17th day of March, 1921, between the hours of 8:50 and 9:15 p. m., the insured met his death by being drowned in the waters of the Columbia River. (58, 63.)

This finding is predicated upon the following facts and circumstances: As before stated, Mr. Stewart was on March 17, 1921, and had for many years prior thereto held the position of cashier of the Kelso State Bank. He also owned a controlling interest in that institution, which the evidence discloses had been in failing circumstances for a long time prior to the last mentioned date. On Sunday, March 6, 1921, Claude P. Hay, state

bank examiner for the state of Washington, held a meeting with Mr. Stewart in the office of the former in Olympia, Washington, and at said time and place demanded the resignation of Mr. Stewart as cashier of the Kelso State Bank. On this phase of the case Mr. Hay testified as follows:

"I asked Stewart to come to Olympia. I told him my reason for demanding his resignation was that I was not satisfied with his management of the institution. I cannot recall whether he wrote out his resignation then or not, but I don't think he did. It was my intention to have him understand that he would have to sever his connection with the bank, but I didn't care to give any publicity to it at the time for fear of the ill effect it might have on the institution. The understanding was that the management of the bank be virtually turned over to someone else, and that he would resign as soon as he could gracefully do so." (88.)

However, Mr. Stewart did not resign.

Shortly after the conference between Mr. Hay, the state bank examiner, and Mr. Stewart in Olympia on March 6, 1921, Louis F. Plamondon, president of the Woodland State Bank, with a view to reorganizing and taking over the management of the Kelso State Bank, made an investigation into the financial condition of the latter bank. The result of Mr. Plamondon's investigation into the

affairs of that bank is contained in a written report rendered to Mr. Hay, dated March 15, 1921, which report was received by Mr. Hay at his office in Olympia on March 16, 1921. (Pltffs' Ex. No. 15, —180, 181.) This report discloses that the bank was hopelessly insolvent.

On March 16, 1921, Mr. Carothers, president of the Kelso State Bank, went to the phone at Kelso, and called Mr. Plamondon at Woodland, and requested that he (Plamondon) phone or wire Mr. Hay, the state bank examiner, to come down and take charge of the bank. This Mr. Plamondon did. Mr. Stewart had no knowledge of Carothers' action in this respect. After the receipt of Mr. Plamondon's message Mr. Hay left Olympia, Washington, and arrived in Kelso between the hours of 8 and 9 p. m., the evening of March 16, 1921. Stewart had not been forewarned of his coming. After Mr. Hay arrived in Kelso he sought out Stewart and made known to him his mission. The two indulged in an extended conference, the result of which was an agreement to journey together to Portland, Oregon, some thirty or thirty-five miles distant from Kelso, and endeavor to procure financial assistance in that city, the financial center of the northwest, to prevent if possible the closing of

the Kelso State Bank. The conference between Hay and Stewart broke up between 1 and 2 o'clock in the morning of March 17, 1921, and when he reached home after its conclusion he was, as testified to by Mrs. Stewart, the defendant in error, "on the verge of a collapse."

Prior to leaving for Portland, Oregon, on the morning of March 17th, between the hours of 5 and 6 a. m., with Mr. Hay, his wife tried to induce him to eat a little breakfast, but he refused so to do. She also testified that he did not sleep during the night.

Mr. Hay testified that while on their way to Portland:

"Stewart was very pale, and under a great strain. He didn't talk very much. I remember that he asked me several times my opinion as to whether or not Collins would help us. I didn't pay very much attention to just what he did say, because it was just what one might expect from a man laboring under great excitement, and Stewart appeared to be laboring under great excitement." (84-88.)

Mr. Hay and Mr. Stewart arrived in Portland between 7 and 8 o'clock on the morning of March 17, 1921. The result of their trip was disappointing in the extreme, as no financial assistance was

forthcoming from that quarter to prevent the impending failure of the Kelso State Bank. Mr. Hay then decided to return to Kelso on the train, leaving Portland at 10 o'clock a. m. Before doing so he called up the president of the Castle Rock State Bank, which city is located some ten miles north of Kelso, and requested the president of that institution to meet him in Kelso upon his return from Portland. It was the thought of Mr. Hay as well as of Mr. Stewart that the president of this institution might consent to come to the aid of the Kelso bank. Upon Mr. Hay's arrival in Kelso he was met by the president of the Castle Rock State Bank, who after a short investigation into the financial condition of the Kelso bank declined to render any financial assistance. Mr. Hay then closed the bank and commenced the process of liquidation.

When Mr. Hay left Portland, Stewart did not accompany him back to Kelso. Some time during the early hours of the afternoon of that day Mr. Stewart, who as noted remained in Portland, Oregon, called Mr. Hay over the phone and in the conversation that followed Mr. Hay informed him that he had been compelled to close the bank. (86.)

Events then followed each other in swift succession. Mr. Stewart went to the Oregon Hotel in Portland, where he always stopped when in that city, and indited to his wife the following letter:

"March 17, 1921.

"Dearest Girl:

"I think I have everything fixed now, but I just learned that they intend to close the bank and I don't know what they intend to do next. Looks as tho they were determined to put me out of business. I am going home by way of Eadem this evening with enough money to stop any ordinary trouble. Collins wouldn't do a thing and I didn't really expect him to, but Hay wanted to try it anyway.

"The whole thing has made me sick and I feel shaky, but think I will make it all O. K. *If anything should happen to me* remember that I have $86,000 of life insurance policies in the vault in your favor and about $50,000 of accident policies all paid up to date. I want you to collect it all and have the Sardams help you. Make up to them any loss they have *if they should have any.*

"Take care of the following obligations of honor out of it, also, please.

"First, a bond I have used out of the Richter estate, of which I am administrator, in the sum of	$10,000
Also 3 of $500 each or a total of	1,500
2 notes of Huntington's which have been paid off, and (which I was under bond for and had the money to help our business)	750
respectively, making a total to Richter estate of	13,250
Also 2 notes indorsed to old Mrs. James of	1,200
Also 1 note to Mrs. Lena Bozorth of (Carr)	600
and 1 to Mrs. Jennie Rogers of approximately	2,000
and 1 to J. H. Rogers of balance of	800
and 1 to the bank of my own of (Johnson)	6,000
and 1 to the bank (Fisk memorandum note)	6,250
and 2 to the bank of $3,750 and $2,200	5,950
	$36,050

being notes of the Kelso Farm Co. which I am responsible for, making a total of $36,050. I don't think of anything else except what the banks and individuals have security for.

"This should leave you plenty for you and Sam. There is a memorandum will in our box in the vault but this action of the people about the bank

nullifies it to quite an extent and I figure they will take all our property and you will have to leave any debts to be taken care of as they shall determine out of the same. There is also a sealed letter of instructions in the box but it covers this same ground, and if you get it better read and destroy it. It was only written in view of what I feared they might do to get me out of the business. *If you can get the money from the Northern Life* on one of their policies, or both in time to do it better take me down to Riverside to be buried next to my brother and where the old folks will want to be ultimately. The other policies will be paid to you slower no doubt. Don't have the old folks come up if you can avoid it. Go down there to them and stay with them as much as you can, as they will need you and the little man to cheer them. Your car is at Stevens, 531 Washington Street. He will sell it or keep it for you. It is yours. The California land was deeded back to Mother for the place next to ours and the deed to it was made out to Ford but he will probably turn it into the bank. He was to cancel our $1,000 note and grocery bill and give us the change out of the $3,500 for it, but I presume that is off. Give them a deed to our home if they want it and reserve your furniture if you want it, and they will let you. Our timber tract sold to the Alger Lbr. Co. has an equity of $62,000 in it but they will take it, and everything else except what is covered by mortgages. I thought we were worth $200,000 and that the bank was solid as Gibralter, but after the Plamondon report we are not worth anything except what you keep out of my insurance money. Don't let the old folks turn any

of their property as they are not responsible except for the assessment of $500 on their stock. Have them send in the stock with the $500 and let it go. Do the best you can to bring Sammy up right. I wouldn't let him go in the banking business as it is one lifelong worry and fight.

"I haven't been able to do very well for you but I have done the best I could at all times and if they had let me alone we would have been on easy street for everyone this spring.

"This is all I can think of now. Of course if I get home with the money and can get by this trouble all this should be destroyed and forgotten.

"You have been the sweetest wife any man ever had and I love you always. Try to keep Sammy and the folks from grieving all you can.

"With all the love in the world, I am,

"Yours, FRED."

(Pltffs' Ex. 16; 191, 192, 193, 195.)

At the same time Mr. Stewart wrote letters to Judge McKenney, Al Maurer and a Mr. Crouch of Kelso, enclosing each a deed to a quarter interest in a certain tract of land, the title to which stood in Mr. Stewart's name. This was done for the purpose of extinguishing debts that Mr. Stewart owed to the parties named. (90, 91, 92; Pltffs' Exs. 1 and 2.)

The evidence next takes up Mr. Stewart at the Union Depot in Portland, about the hour of 4 p. m. of the same day. When he arrived at the depot he was met by Robert Roberts, a colored porter, who knew him well. Mr. Roberts possessed himself of Stewart's grip and brief case, and with these articles started to make his way to the train, then about due to leave, which passes through Kelso on its run to Seattle. Mr. Stewart did not follow Mr. Roberts, who returned to where Stewart was standing and for the first time noticed that something unusual was wrong with Mr. Stewart. Says Mr. Roberts in his testimony:

"He (Stewart) just walked around a few steps and looked like he was in a great quandary, undecided which way to go, or what to do. Then he came up the steps and beckoned me to come out with his baggage. I came out with the baggage, and he said, 'Put it in this car here, the first one.' I said, 'Have you changed your mnd Mr. Stewart?' and he said, 'Yes, I have.' And with that he drove away. I never saw him again. He looked like he was in a deep study or had not reached a decision whether to go or not to go in that direction. That was unusual for him. * * *" (103-104.)

The evidence then loses sight of Mr. Stewart until about the hour of 6 o'clock p. m. of the same afternoon, when he was found by one Carl Hayes, a resi-

dent of Kelso, and who was well acquainted with Stewart, on board a train that leaves from what is known as the North Bank Station, in Portland, and runs to Astoria, Oregon. After Hayes discovered Stewart on this train he attempted to engage him in conversation, but Stewart requested Hayes to leave him as he wanted to get some sleep. (111-113.) Hayes complied with the request and went into another car. Testifying as to Stewart's condition Hayes says:

"His voice was changed and he was completely worn out, just like a man that had just got out of the hospital. There was no color in his face and no pep at all. He seemed to be worried and nervous, just a physical wreck; not the same man at all that I had known before." (112.)

The train on which Stewart was a passenger runs through the towns of St. Helens, Goble, and Rainier, in the order named. When the train reached St. Helens, which is some ten miles south of Goble, Stewart left the train. Why he did so no one knows. The train from which Stewart had disembarked had hardly left the station when he rushed up to a man by the name of Clyde Hanson, who was at the time driving an automobile for hire between St. Helens and other small towns situated on the Columbia River, and requested him to take him to

Goble and if possible to reach there ahead of the train that had just departed. (105.) This Mr. Hanson endeavored to do, but the train out-distanced him. Goble, it will be remembered, is the point where the trains formerly ferried across the Columbia River prior to the construction of the bridge at Vancouver. Kalama is on the Washington side and Goble on the Oregon side, and between the two a ferry service is maintained. At this point the Columbia River is over a mile wide. It is deep, wide, swift and treacherous stream, and on the night in question was some twelve or fifteen feet out of its banks and rising rapidly. (142.) After arriving at Goble, Stewart, while waiting for the boat to return from Kalama to Goble, went to the telephone and called up his home at Kelso. The call was answered by one Frank Sardam, an intimate friend of Mr. Stewart, who was at the time in Mr. Stewart's home at Kelso. When connection was secured, Stewart, says Sardam:

"wanted to know how Sam (his boy) and his wife were. * * * Towards the end of the conversation his voice kind of pitched up high, peaked out like a man who was sort of backing away from the phone. The unusual thing about his conversation was that his voice sounded like he was trying to control it. It was suppressed in some way." (121-122.)

Between Goble and Kalama a small ferryboat named the "Queen" plies the waters of the Columbia River. This boat left Goble for Kalama at the hour of 8:50 p. m. on that night, bearing Mr. Stewart as one of its passengers. On the following page we reproduce a photograph of this boat, which photo was offered and received in evidence and marked plaintiffs' exhibit 9 upon the trial in the lower court. The crew on this boat consisted of William Pomeroy, the pilot, and Paul G. Shotswell, the purser, both of whom were well acquainted with Stewart. On the boat were five other passengers, Jack Chisholm of Kalama, Washington, John Scanlon, Raymond Schorer and H. L. Curtis, all of Centralia, Washington, and a traveling salesman referred to in the evidence as "the drummer."

As the boat left the Oregon side Stewart stood on the prow of the boat until his fare was collected by Shotswell, the purser. (163.) As the boat reached the middle of the Columbia River, Stewart, with a sudden movement that attracted the attention of Pomeroy, (142) Chisholm (225), and others, suddenly left the prow of the boat, went into the cabin where Scanlon, Curtis and Schorer were seated, opened the door that gave access to a little platform on the rear of the boat (see Pltffs' Ex. 9)

EN OF KALAMA

which is boxed up so that it is impossible to walk around either side of the boat, and disappeared from human eye forever. Within a very brief space of time after Stewart had gone through the cabin of this boat on to the platform, Schorer and Curtis opened the rear door and walked out on to the back platform. Stewart was not there. These young men were not at that time acquainted with the construction of the boat, but they nevertheless were a little mystified over the disappearance of Mr. Stewart, whom neither knew. They returned into the cabin just as the boat reached the landing in Kalama, and as they went up the slip both asked Mr. Scanlon, who is and was at the time a timber cruiser in the employ of the Weyerhaeuser Timber Company, Schorer and Curtis being his assistants, "if the man that went out the door came back through the cabin," and upon Scanlon's replying in the negative one of them remarked, "Well, he must be in the river." (170.)

When the boat drew up to the landing in Kalama, Shotswell, the purser, as was his custom, stepped off the boat, and, facing the boat, held it fast to the side of the "Elf," which was lying next to the landing, while the passengers disembarked. Shotswell noticed that Stewart did not get off, and he

testified that it would have been impossible for Stewart to have left the boat without being observed by him. Shotswell, after he had noticed that Stewart had not left the boat, immediately called to Mr. Pomeroy, the pilot, who was in the pilot house, and who had a full view of the passengers as they left the boat, and asked him "if Stewart got off," and upon receiving a negative reply either Shotswell or Pomeroy called to Captain Reid, who was standing at the head of the landing and asked him if he had seen Stewart and upon being told that he had not they made a thorough search of the boat, but Stewart was not to be found. His grip was in the pilot house, where he had placed it upon boarding the boat at Goble. After the search of the boat had been finished Captain Reid went to the telephone and called up J. W. Hoggatt, sheriff of Cowlitz County, and told him that "Stewart was overboard, went into the river." (197.) Continuing, the witness, Hoggatt, testified:

"I says, 'What Stewart?' He says, 'F. L. Stewart, the banker at Kelso,' I says, 'Are you positive?' He said, 'I am.' I asked him if he had looked on the boat, and he says, 'We have; we have searched the boat and he isn't there.' " (197.)

Captain Reid also phoned to William Stuart (no relation of the insured), prosecuting attorney of

Cowlitz County, and told him that Stewart: "jumped off the boat; committed suicide."

Captain Reid then instructed Mr. Pomeroy, the pilot of the boat Queen, to make a report to the government as required by statute, or the rules of navigation, that Mr. Stewart had been drowned while a passenger on the boat. (526.) Mr. Pomeroy, the pilot, testified that it was impossible for Stewart to have left the boat at Kalama without being observed by him. Among other things this witness testified as follows:

"When the boat got to the railing the passengers went ashore. I was standing in the window. The passengers had to pass by me or jump over the railing. The passengers all passed out but Stewart. I noticed his absence. I raised the alarm. I hollered up to Captain Reid and asked him if Stewart had come on to the slip. Captain Reid said, 'No, sir.' I then took my spotlight and searched the boat thoroughly. I could not find him. He left his grip in the pilot house and I took it up and checked it in the depot. * * * No one could have passed from the Queen to the Elf without my seeing them during the landing of the passengers. The depth of the water from the rear of the Queen at the place we landed to the wharf is I think about fifteen or sixteen feet." (143, 160.)

After Mr. Stewart's disappearance a search was instituted for the body, and kept up for a period of

seventeen days. Captain Reid, owner of the boat "Queen" led in the search for the body. It was never found.

Upon the trial many witnesses who lived on the banks of the Columbia River for a period of time varying from twenty to forty years, testified that a great many persons were drowned in the waters of that river whose bodies were never recovered. On this phase of the case we call particular attention to the testimony of Dr. Byrd (130 to 140 inc.), Christ Hansen (201 to 206 inc.), G. H. Thayer (210). Dr. Byrd, who is a physician of many years' practice and at the time of the trial was chief medical adviser of the Industrial Insurance Commission of the state of Washington, testified:

"I lived in Kelso during the fourteen years I lived in Cowlitz County. I was county coroner of that county for a while. I held the office three and a half or four years. Practically the whole itme I was in Cowlitz County I was surgeon for the Hammond Lumber Company; they had camps from Oak Point as far as Carrolls Point, which is over a distance of thirty miles. I had a boat that was partly furnished by the company, that I might go up and down the river and look for the injured men, and I was on the river a great deal during the time I lived in Cowlitz County.

"Q. While you were county coroner and while you were down there, a practicing physician, did you take any note or have you any knowledge as to how many persons were drowned in the waters of the Columbia and Cowlitz rivers, whose bodies were never recovered?

"A. I could not state as to the exact number, but there were quite a large number that were never recovered. * * *

"I remember a number of * * * instances, just how many I could not say, of bodies that I had records of. I kept a scrap book, and I put all the clippings from newspapers in my file so we could use them for identification in case the bodies came in the big boom at the mouth of the Cowlitz River, because the current hangs on the Washington side, striking Carroll's Point, and leaving the Washington side below Mount Solo, and it is within that district that we used to get most of the bodies.

"I remember a case of where a girl named Mabel Londo and a man named Parker Day were driving at high speed across Columbia Slough. There was a curve in the bridge, and they didn't make the curve—went through the railing—and the automobile was found the next morning. Neither of the bodies was found. Many months after that I and an Indian got the girl out of a tree on Cottonwood Island. The bridge which I have just referred to is just opposite Vancouver, close to where the Union Meat Company's plant is now, and from Vancouver to Carroll's Point would be something

like forty miles, and I got her off Cottonwood Island, right opposite Carroll's Point. She was up in a tree. She had come in there on the high water. The water receded and left her up in the tree. The body of Day, so far as I know was never found.
* * *

"I have tried on four different occasions to resuscitate and bring back to life the bodies of persons who have fallen in either the Columbia or Cowlitz rivers. I never succeeded. One of the bodies had been in the water about eight minutes, another about thirty minutes, and the other two about ten minutes. The reason it was impossible for me to resuscitate the bodies was that the waters were so cold that the capillary circulation coagulates immediately, and you cannot re-establish the circulation by virtue of the coagulation of the capillary circulation.
* * *

"I don't think that if a person heavily clothed went into the Columbia River on the night of March 17th, 1,000 feet from the shore, the river being 12 feet out of the banks, and the water cold, as cold as I have described, that he could possibly survive. I think it would be too far for him to attempt to swim, even if he was a good swimmer." (130-131-132-133.)

It is undisputed that Mr. Stewart could not swim.

Christ Hansen testified in part as follows:

"My occupation is that of diver. I have been engaged in diving for ten years. I am familiar with the bottom of the Columbia River in the vicin-

ity of Kalama. * * * The water runs all the way from thirty-five to sixty-eight feet in depth. The water on the 21st of March, 1921, was high, being about twelve feet above normal. The bottom of the river, starting in there and extending on through to Goble and below, is very rough in some places. It will form holes in banks at different places, there will be piles of snags,—that is trees,—would pile up, drift down with high water, and eventually work a hole in the bottom of the river, and they will stop there and they will bury up, which will take several tons strain to pull them back out of the ground. * * * Some of these holes are pretty large, some not very large, some not over fifty feet across, but they will be from fifteen to twenty feet deep. * * * * If you go down the river to Coffin Rock about one mile the river is 180 feet deep.

"Q. Have you ever found bodies * * * in the bottom of the river when you were down there?

"A. I have. The only times that I can find them is when the river is very low. You take on high water it is no use. You can't work or you can't hardly stay there, and in quiet water along shore mostly are the places where I can find them. After anything lays in the bottom of the river for a few hours, when the river is * * * rising and muddy, the sand moving will fill it over, shove it into a hole, probably, and that hole eventually fill over if it lays any length of time. * * * I have found dead bodies in the Columbia River. I don't know exactly how many, but about ten. I have

seen two or three cases where I had to break them loose to get them out. * * * Quite a few people have been drowned in the Columbia River whose bodies have not been recovered. * * * I have looked for three myself, which were never found. I saw one person drowned whose body was never found.

"Q. Take the condition of the water as you know it to be on the evening of March 17, 1921, do you think from your knowledge of the water that a man could live in the water very long if he should happen to fall overboard or get out of the boat with all of his clothing on?

"A. Not very well. It is pretty cold.

"Q. Do you think a man would live very long that was in there?

"A. No." (201-202-203-204.)

Shortly after Mr. Stewart's disappearance the superior court of the state of Washington for Cowlitz County appointed Judge H. E. McKenney of Kelso, Washington, administrator of Mr. Stewart's estate. (90.) It was shown by the testimony of Judge McKenney, who was a witness upon the trial in the court below, that the estate was hopelessly insolvent. (90, 91, 92.) Judge McKenney and Mr. T. H. Adams, who was afterwards appointed receiver of the Kelso State Bank, both testified

that no claims had ever been filed by any person, firm or corporation against Mr. Stewart's estate, or against the bank by reason of any transactions with Mr. Stewart on March 17, 1921, or for many days prior thereto. This testimony was introduced for the purpose of showing that Mr. Stewart did not raise any money to tide over the affairs of the bank while in Portland on March 17, 1921. (186; Pltffs' Ex. 16.) After the appointment of the administrator of the estate Mr. Stewart's private box in the Kelso State Bank was opened and a letter was found, addressed to his wife, under date of March 15, 1921, which letter was offered and received in evidence on the trial and was marked plaintiffs' exhibit 17. (191.) It is unnecessary to reproduce this latter letter in this brief as it is in substance the same as plaintiff's exhibit No. 16.

The statment made in the brief of counsel for plaintiffs in error on page —, that on the 17th day of March, 1921, Mr. Stewart had "in full force and effect $86,000 of insurance on his life," is perhaps misleading. All of the policies of insurance, other than the ones involved in this action and two small policies payable to his estate, provided that if the insured met death by his own act they would be void. Of course the accident insurance that he

carried was subject to the same excepted clause. The only collectible life insurance that he had at the time of his death was the amount involved in this proceeding, save as noted. However, Mr. Stewart seems to have labored under the idea that he carried life insurance to the extent of $86,000 that would be payable when his death occurred, regardless of the cause of death. (Pltffs' Exs. 16 and 17.)

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PROOFS OF DEATH

Immediately after the death of Mr. Stewart the insurance companies were notified of that fact. (Pltffs' Ex. 27.) On April 9, 1921, proofs of death were forwarded to the Mutual Life Insurance Company. (Pltffs' Ex. 18.) This exhibit is on a form furnished to the beneficiary by this insurance company. It sets forth the claimant's name, residence, date of birth, name of deceased and place of his birth, the date of his birth, the place where deceased met his death, his last residence, the name of the county where his estate is being administered, his occupation and the cause of death, and in all things is full and complete, save and except there is an absence of physician's or coroner's certificate,

which under the circumstances of course could not be made, the body never having been recovered. This proof of death was forwarded to the office of the Mutual Life Insurance Company in Seattle, Washington, but it was stipulated by counsel that the same was forwarded from the Seattle office to the home office of the company in New York. (216.) After receiving this proof of death the Mutual Life Insurance Company raised no objections of any kind or character whatsoever thereto.

On April 18, 1921, proofs of death were sent to the Prudential Insurance Company at Newark, New Jersey. (Pltffs' Ex. 28.) This proof of death is on a form furnished by the company and gave all particulars as to the death of the deceased as required in the printed questions. Upon receipt of this proof of death and under date of April 26, 1921 (Pltffs' Ex. 20), the Prudential Insurance Company acknowledged receipt of the same, and in a letter addressed to Mr. Frank Sardam, who on behalf of defendant in error had sent the company the proof of death, said:

"We have your April 18th letter, enclosing claimant's certificate of Mrs. Stewart. This statement of the beneficiary will hardly be considered proof of death, and we suggest that the beneficiary endeavor

to establish the death of the insured through circumstantial evidence by means of specially drawn affidavits."

On May 13, 1921, acting on the suggestion contained in the letter of the Prudential Insurance Company under date of April 26, 1921 (Pltffs' Ex. 20), defendant in error sent to the Prudential Insurance Company her specially prepared affidavit, detailing all the facts and circumstances connected with the claimed death of Mr. Stewart. (Pltffs' Ex. 29.) Separate identic affidavits were sent to cover each policy of insurance. In the letter transmitting this specially prepared affidavit Mr. Fitch, who wrote the same and who was at the time acting as one of the attorneys for the defendant in error, said:

"Complete proofs of loss under the terms of said policy heretofore have been sent you, but if at any time you desire and we can furnish you with any further or additional proof or evidence in this matter we stand ready to do so." (Pltffs' Ex. 29.)

A like affidavit of the defendant in error was also sent to the Mutual Life Insurance Company under date of May 13, 1921 (Pltffs' Ex. 26), although that company had made no request for any additional proofs.

Under date of July 13, 1921, specially prepared affidavits of Paul G. Shotswell, one for each policy of insurance, were sent not only to the Prudential Insurance Company, but to the Mutual Life Insurance Company as well. It will be recalled that Mr. Shotswell was the purser on the boat Queen on the night that it is claimed Mr. Stewart lost his life by being drowned in the waters of the Columbia River. In the affidavit of Mr. Shotswell all the facts and circumstances connected with the claimed death of Mr. Stewart are set forth and fully detailed. No objection whatever was made or pointed out by either of these companies to the affidavits of Mrs. Stewart, the defendant in error, and Paul G. Shotswell. They received and retained all proofs of death and affidavits in connection therewith, and raised no objection whatever thereto.

Not only did these companies fail to make any objection to the proofs of death, but the record affirmatively discloses that in June of 1921 they sent from the city of Chicago, Illinois, an investigator by the name of Francis K. Wilton to investigate the facts and circumstances connected with the death of Mr. Stewart. Mr. Wilton arrived in Kelso on June 3, 1921, and immediately entered upon his work. (354.) Thereafter Mr. Wilton went to the

prosecuting attorney of Cowlitz County, Washington, and endeavored to induce that official to issue a warrant for the arrest of Mr. Stewart on the ground that he was engaged in an attempt to swindle the insurance companies. (327.) This the prosecuting attorney refused to do because it was his firm belief that Mr. Stewart was dead (327-328.) Mr. Wilton thereafter extended his investigations from Kelso, Washington, to Hanford, San Francisco, Riverside, and San Diego, California, and the testimony gathered by him in the course of his investigations was used by each of the insurance companies in an effort to defeat the claim of the defendant in error. The twelfth finding of fact in each case, neither of which was excepted to, is as follows:

"That the said defendant * * * thereafter denied that the said Frederick L. Stewart was dead, and by its answer filed herein joined issue with the plaintiff on the allegation concerning the death of the said Frederick L. Stewart." (59, 64.)

On the trial in the court below no specific objection was interposed when the proofs of death submitted to these insurance companies prior to the commencement of this action were offered and received in evidence. The only objection to their intro-

duction was that they were "immaterial and irrelevant," or "incompetent, immaterial and irrelevant, and not tending to furnish proof of death." (213, 214, 215, 216.) The position of counsel for plaintiff in error at the time of the trial was stated by Mr. Rupp in these words:

"My position in the matter briefly is this. We wrote these policies. If this man is dead we are willing to pay them. If he is not dead we are not willing to pay them." (219.)

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THE DEFENSE

The defense claimed that Mr. Stewart was not drowned on the night of March 17, 1921, and that subsequent to that date he was seen alive in the state of California. To substantiate this contention the testimony of George Elwood, Orvalle Onorato, Walter Comber, Benjamin Vienna, Spiro Papalian and others, is relied upon. Mr. Elwood lived in Kelso prior to 1906, following the avocation of a barber. He claimed that when he lived in Kelso he was well acquainted with Mr. Stewart. He says that since moving away from Kelso in 1906 he has seen Mr. Stewart three times, once in

1914, once in 1920, and again on or about March 23 or 24, 1921, at Hanford, California. He testified that he was in a barber shop at the latter place, and looking out of the window he saw Mr. Stewart leaving a nearby restaurant; that Stewart was in such a position that he could not see his face, but that he was satisfied it was Stewart. Shortly thereafter Mr. Elwood, who was at the time traveling for a barber supply house, left California and went to Oregon and Washington. When he arrived at Cottage Grove, Oregon, which is only a short distance from Portland, he testified that he first heard that the bank with which Stewart had been connected had failed, and that it was claimed that Mr. Stewart was dead. He had previously testified that he was very friendly with Mr. Stewart. About this time Judge Cushman took a hand in the examination of the witness, and the record discloses the following:

"THE COURT: I want to straighten out something. You came back to Cottage Grove after you say this man at Hanford?

"THE WITNESS: Not back to Cottage Grove, but on my way.

"THE COURT: You worked your way up until you got to Cottage Grove?

"THE WITNESS: Yes, sir.

"THE COURT: You say you got there about a month after?

"THE WITNESS: Something like that.

"THE COURT: How long were you there?

"THE WITNESS: I Sundayed there. I have a sister-in-law there.

"THE COURT: Mr. Stewart was not married when you were in Kelso—when you were barbering?

"THE WITNESS: No, sir.

"THE COURT: But he was married when you saw him in 1920?

"THE WITNESS: Well, I understood that he was. I never met him before.

"THE COURT: But you understood he was married?

"THE WITNESS: Yes.

"THE COURT: And you did not learn about the claim that he had been drowned until you got back to Cottage Grove?

"THE WITNESS: No, sir.

"THE COURT: How long after you got to Cottage Grove until you came to Kelso?

"THE WITNESS: Well, you see it would take several days because I made Portland. It was not very long.

"THE COURT: A week later?

"THE WITNESS: It would probably be a little more than a week.

"THE COURT: Two weeks?

"THE WITNESS: Well, somewhere around there. Sometimes I would take a week in Portland, but this time I only spent one day.

"THE COURT: After the time you learned at Cottage Grove that Stewart was supposed to be drowned, did you do anything to communicate with his wife or anybody at Kelso that you had seen him at Hanford?

"THE WITNESS: No, sir.

"THE COURT: Call your next." (277,278,279.)

After Mr. Elwood left Cottage Grove, Oregon, and after stopping one day in Portland, he arrived in Kalama, Washington, about May 6th. When he reached Kalama he went into a barber shop, conducted by a man by the name of Taylor, and while there stated that he had seen Mr. Stewart in California. He was asked by one George N. Campbell, a banker of that city, who was in the shop at the time, when it was that he saw Mr. Stewart in Hanford, California, and he replied by saying that it was on February 22, 1921. When asked why he knew that was the date he replied by saying that it was George Washington's birthday, and that all the stores in Hanford, save barber

shops and restaurants, were closed. (319, 320.) The witness also admitted on cross-examination that while in Taylor's barber shop in Kalama in May, 1921, he stated in the presence of several persons that he would not swear positively that it was Stewart he saw in Hanford, California. (270.) The statement of this witness that he had seen Stewart in California was further impeached by the testimony of Lawrence Perry (321), Russell Carothers (322), F. A. Byrd (323), Frank J. Sardam (330), Paul G. Shotswell (340), C. M. Taylor (341), all of whom testified that Elwood admitted to them that he was not positive and would not swear that it was Stewart he saw on the street of Hanford, California.

Next the defense offered in evidence the depositions of Benjamin Vienna, and Spiro Papalian, both of Hanford, California. Vienna is a barber, and it was in the shop where Vienna worked that Elwood was standing when he swore that he saw Stewart crossing one of the public streets of Hanford, California. Papalian is the owner of the restaurant out of which Mr. Elwood said he saw Stewart emerge. Neither of these witnesses had any previous acquaintance with Mr. Stewart. Vi-

enna was shown the old photograph of Mr. Stewart, taken some time prior to 1909, and he testified that:

"The picture marked defendant's exhibit "C" appears to be a customer who came into my shop the 23rd or 24th of March last. I served him, cut his hair. His hair was kind of crimpy. It was pretty long. * * * When I finished his hair was cut *practically the same as presented in the picture, only a little closer.* His hair was brown, and also some grey around the edges. (282.)

Spiro Papalian, the restaurant keeper, out of whose restaurant Mr. Elwood said that he saw Mr. Stewart emerge, testified:

"Defendant's exhibit "C" appears to be a picture of the man that was served in my restaurant March 23rd or 24th. It looks like exactly the party that was waited on." (279.)

On cross-examination Mr. Papalian testified:

"I was in my restaurant during all the month of February, 1921. I went to Stockton during the first week in March, 1921. I left here Saturday.

"Q. Referring now to defendant's exhibit 'C,' had you ever—that party that you say you think was in your restaurant, had he ever been in there prior to that time before?

"A. About two or three meals he had been eating there *before I left.*" (280.)

In just one sentence Mr. Papalian, the Greek restaurant keeper, completely exploded the theory of the defense that the person who took a meal in his restaurant on March 23rd or 24th, 1921, and whose hair was cut by Vienna on the morning of that day, and the person observed by Elwood coming out of this restaurant could possibly have been Stewart.

Next the defense took the depositions of Arthur E. Pooley, K. Hansen and F. C. Meyer, purser, first officer and captain, respectively, of the steamer Mazatlan, plying between California ports and Mexico. None of these witnesses had any acquaintance whatever with Mr. Stewart. They were each shown the old photograph of Stewart and testified that a person resembling the person shown in the photograph took passage on the Mazatlan, that left San Pedro on or about April 3rd or 4th, 1921, and debarked at Manzanillo, Mexico, which port the ship Mazatlan reached on April 20th, 1921. Pooley, the purser, testified that the person on board had hair that

"was brown as mine, or light hair. It was a mixture of color, a mixture of brown with a little grey in it. You might call it sandy, but not red, a mixture of brown. It was wavy. He had it *cut the same style as exhibits 'A' and 'B'* * * *

I had occasion to see him every day and did see him every day. He ate at the same table with me, he talked with me there. He sat opposite me at the table. * * * I didn't notice about this man's teeth. I didn't notice anything peculiar about his teeth." (294, 295, 296.)

Hansen, the first mate, testified:

"We had a person on that boat which this appears to be a picture. His hair was wavy. It was something like mine, brown. It was light brown. * * * I will not swear that the man who was on board ship that I have been testifying about is the man shown in the photo." (297, 298.)

Mr. Meyer, the captain, testified:

"Exhibit 'A' appears to be a likeness or a picture of a passenger on that trip. * * * I don't know whether his hair would be blonde or red, or whatever he would call it, light anyway. * * * *I should say he had long hair, well combed.* * * * I believe we had a few games of penny ante with this man around a small deal table * * * *I didn't notice anything out of the ordinary about this man's teeth.* * * * I will not swear this is a photo of the man that was on the ship." (299, 300.)

The record discloses that the steamer Mazatlan landed at Manzanillo, Mexico, on *April 20th*, 1921. We call the particular attention of the court to this date so that it may readily appreciate what

next follows in this statement. It is this: The defense took the deposition of Orvalle Onorato, who once lived in Kelso, Washington, and who said he was acquainted with Mr. Stewart, but who had recently spent several years of his life in Italy. Mr. Onorato said that he was driving through the streets of Pasadena, California, in an automobile on *April 26*, 1921, just before noon, having left San Bernardino that morning, and that he observed Mr. Stewart on one of the streets of that city. On cross-examination the witness testified that:

"Before I had made positively sure it was him (Stewart) I had passed him." (219.)

Further the witness admitted that he was in Kelso, Washington, on May 23, 1921, and for thirty-six days thereafter, and that while there he told J. S. Robb, a resident of that place, that he would not swear the person he saw in Pasadena was Mr. Stewart. He further admitted that while in Kelso he talked to Judge McKenney, the administrator of Mr. Stewart's estate, who wanted him to sign an affidavit that he saw Stewart in Pasadena on April 26, 1921, but that he refused so to do, assigning as a reason that "I didn't want to be bothered." (293.)

Further testifying, this witness said:

"I *believe* I was in San Bernardino on the night of April 25; *don't* remember what hotel I stopped at; *don't* remember how much I paid for my room; * * * *don't* know the first name of either one of the Hall boys; I *believe* I met the Hall boys on the afternoon of April 25, 1921. * * * They took me home with them; I have *forgotten* where they live; I only remained there a few minutes on the afternoon of September 25, 1921; I *don't* know where I went after I left their place; I *don't* remember the kind of a hotel that I stayed at on the night of April 25; I *don't* remember what part of the town the hotel was in; I *can't* say how many times I had been in San Bernardino prior to April 25. I made frequent trips there. * * *

"I saw Mrs. Stewart in Elsinore after I returned from Kelso to March Field. I returned from Kelso about the 1st of July. I saw her on the streets. * * *"

(At the time this witness says he saw Mrs. Stewart on the streets of Elsinore, California, the testimony is quite conclusive that she was in Los Altos, California, some eighteen miles from San Jose, and 400 miles or more distant from Elsinore, having left Elsinore on June 14, 1921.) (353.)

Next the defense called Harry E. Moores, a railroad ticket agent, who testified that he was familiar with the time table of the Mexican rail-

roads, and also of the railroads in the United States, and that a person landing in Manzanillo, Mexico, on April 20th could, traveling by way of El Paso, Texas, reach Los Angeles in approximately five days. On cross-examination he admitted that it would take four days to make the trip from Manzanillo, Mexico, to El Paso, Texas. (308.)

Next the defense called Walter H. Comber as a witness on their behalf. Mr. Comber, who at the time of the giving of his testimony was a resident of Riverside, California, testified that in 1914 he was living in Seattle, and that he was engaged in running an automobile for hire between that city and Rainier National Park, and that in the summer of 1914 he drove Fred Stewart from Seattle to the last named place. Mr. Comber further deposed that after having driven Mr. Stewart to Rainier National Park in the year 1914 he met him several times thereafter in Seattle. Continuing, the witness testified that in the month of August, 1921, he observed Mr. Stewart on two separate occasions walking around the streets of Pasadena, California. In rebuttal and impeachment of this witness's testimony it was shown that Mr. Comber was sentenced by the superior court of the State of Washington, for King County, to

serve a term of three years in the State Penitentiary at Walla Walla, Washington, for burglary. (315.) It was further shown by the testimony of Judge Smith of the superior court of King County, Washington (313, 314), Edwin C. Ewing, corporation counsel of the city of Seattle (315), Charles F. Riddell, attorney-at-law and formerly United States district attorney for the Western District of Washington (315), and S. W. Taggart (315), manager of the Seattle Taxicab Company, that Comber's reputation for truth and veracity is worthless. It was further disclosed that in addition to being a convict Comber deliberately perjured himself when he swore that he drove Fred Stewart to Rainier National Park from Seattle in the year 1914. It was conclusively shown that the first trip that Mr. Stewart ever made to Rainier National Park was in the summer of 1919; that during the spring, summer and fall of 1914 his wife was sick with a tubercular affection, confined to her bed for that period of time, and that Mr. Stewart was not out of the city of Kelso over night for the same period. (350, 351.)

John Reid was also called as a witness by the defense. Mr. Reid is the owner of the ferry boat Queen, on which Mr. Stewart was a passenger on

the night of March 17, 1921. Mr. Reid testified that he was standing at the top of the slip (see exhibit ——) when the "Queen" landed at Kalama on that night, and he testified that, "According to my count six passengers came up the slip." (231.) Mr. Reid was well acquainted with Mr. Stewart but did not testify nor attempt to testify that Mr. Stewart got off the boat. The testimony shows that the landing was well lighted on the night in question.

In impeachment of the testimony of Mr. Reid it was shown by the testimony of Lawrence Perry (321), Grover L. Thornton (324), J. W. Hoggatt, sheriff of Cowlitz County (197, 198, 325), William Stuart, prosecuting attorney of Cowlitz County (327), Edward White, deputy sheriff of Cowlitz County (326), and W. S. Carson (329), that Mr. Reid had stated to them that only five persons got off the boat on the night in question. It was further shown by the testimony of Mr. Reid himself that he joined in the search for Mr. Stewart's body and spent seventeen days in making that search. When he was also asked on cross-examination why he did not tell the sheriff and the prosecuting attorney of Cowlitz County that six persons got off the boat on the night of March 17th he

replied by saying: "I wouldn't tell them anything." (255.) He admitted that some time after Mr. Stewart's disappearance he told Mrs. Stewart that he wolud do all he could to help her. When asked why he had changed his mind he answered as follows:

"I seen the poor people that had suffered in this case and lost their money, and was destitute, and my *know* that those six men come off the boat, why should I shield this man if he was the sixth man? Why should I do it? Therefore I changed my mind. Mrs. Reid told me, she says, 'Jack, you are a fool for to stand this thing, to spend your money and your time on this man's body when you know there were six men got off that boat,' and that is why I changed my mind."

"Yes, I searched the river for seventeen days with my boat, hunting for Stewart's body. I did that to convince myself, to make sure that Mr. Stewart was not in the river. Yet I told nobody but Mrs. Reid." (254, 255.)

Within a few minutes the witness gave another reason as to why he changed his mind to do what he could do to help Mrs. Stewart. He says:

"I wanted to keep it forever a secret that six men got off the boat, but I changed my mind. I changed my mind the day they refused to send me that 100 gallons of oil, which was about the 15th of April. I then told Mrs. Reid and nobody

else until about the 15th of March, 1922. I then told Mr. Bryce. At the time I told him we were in his office at Portland. Mr. Bryce is here in the court room." (258.)

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ARGUMENT

I

Sections 649 and 700 of the Revised Statutes provide as follows:

"Sec. 649. Issues of fact in civil cases in any circuit court may be tried and determined by the court, without the intervention of a jury, whenever the parties, or their attorneys of record, file with the clerk a stipulation in writing waiving a jury. The finding of the court upon the facts, which may be either general or special, shall have the same effect as the verdict of a jury." (Comp. St. 1918, Sec. 1587.)

"Sec. 700. When an issue of fact in any civil cause in a circuit court is tried and determined by the court without the intervention of a jury, according to section six hundred and forty-nine, the rulings of the court in the progress of the trial of the cause, if excepted to at the time, and duly presented by a bill of exceptions, may be reviewed by the Supreme Court upon a writ of error or upon appeal; and when the finding is special the review may extend to the determination of the

sufficiency of the facts found to support the judgment." (Comp. St. 1918, Sec. 1668.)

For the abolition of the circuit courts and the transfer of their powers and duties to the district court see sections 1266-1268 of the Compiled Statutes of 1918.

"These statutory provisions," said this circuit in United States vs. Columbia & Nehalim River Railroad Co., a corporation, 274 Fed. 625, "are perfectly plain. The first cited is to the effect that where in an action at law a jury is duly waived and the trial had to the court the findings of the latter may be either general or special, and, whether the one or the other, shall have the same effect as the verdict of a jury; and section 700 is to the effect that where such an action is so tried and determined by the court without the intervention of a jury, the rulings of the court in the progress of the trial if excepted to at the time and duly presented by bill of exceptions may be revised upon a writ of error or upon appeal; and when the finding is special such review may extend to the determination of the sufficiency of the facts found to support the judgment."

Having in mind this language as used by this court in the case cited, the proposition recurs, what questions are here presented for review? The statute seems plain and unambiguous. The reviewable questions may be stated as follows:

1. Rulings of the court during the progress of the trial if excepted to at the time and presented by a bill of exceptions; and,

2. The sufficiency of the facts found to support the judgment.

This section (700) has often been construed by the supreme court of the United States in a series of decisions that admit of no doubt as to their meaning. We cite:

Boogher vs. N. Y. Life Ins. Co., 103 U. S. 90, 97; 26 L. Ed. 310.

Norris vs. Jackson, 9 Wallace 125; 19 L. Ed. 608.

Martinton vs. Fairbanks, 112 U. S. 670; 28 L. Ed. 862.

Lehnen vs. Dickson, 148 U. S. 71; 37 L. Ed. 373.

Dooley vs. Pease, 180 U. S. 126-131; 45 L. Ed. 457.

Wilson vs. Merchants L. & Tr. Co., 183 U. S. 121, 127; 46 L. Ed. 113.

In all of these cases it is held that it matters not whether the finding be general or special, it has the same effect as the verdict of a jury, and

in the circumstances in which it is given is conclusive and prevents any inquiry as to whether it is sustained by the evidence.

In Boogher vs. N. Y. Life Ins. Co., *supra*, we read:

"We have often held that the act of 1865, Sec. 649-700, Rev. St., does not permit us to consider the effect of the evidence in the case, but only to determine whether the facts found on the trial below are sufficient to support the judgment, and to pass on the rulings of the court in the progress of the trial presented by bill of exceptions. For all the purposes of our review the facts as found and stated by the court below are conclusive." (26 L. Ed., p. 312.)

A concise and correct statement as to the effect of findings, both general and special, in a trial by the court is found in Lehnen vs. Dickson, *supra*, and we excerpt from the body of the opinion the following:

"Sections 648 and 649 of the Revised Statutes, while committing generally the trial of the issues of fact to a jury, authorize parties to waive a jury and submit such trial to the court, adding that 'the finding of the court upon the facts, which may be either general or special, shall have the same effect as the verdict of a jury.' But the verdict of a jury settles all questions of fact. As said by Mr. Justice Blatchford, in Lancaster vs. Collins, 115 U. S. 222, 225: 'This court cannot review the weight

of the evidence, and can look into it only to see whether there was error in not directing a verdict for the plaintiff on the question of variance, or because there was no evidence to sustain the verdict rendered.' The finding of the court, to have the same effect, must be equally conclusive and equally removed from examination in this court the testimony given on the trial. Insurance Co. vs. Folsom, 18 Wall. 237; Cooper vs. Omohundro, 19 Wall. 65. Further, Section 700 provides that 'when an issue of fact in any civil cause in a circuit court is tried and determined by the court without the intervention of a jury, according to Section 649, the rulings of the court in the progress of the trial of the cause, if excepted to at the time, and duly presented by a bill of exceptions, may be reviewed by the supreme court upon a writ of error or upon appeal; and when the finding is special the review may extend to the sufficiency of the facts found to support the judgment.' Under that, the rulings of the court in the trial, if properly preserved, can be reviewed here, and we may also determine whether the facts as specially found support the judgment; but if there be no special findings there can be no inquiry as to whether the judgment is thus supported. We must accept the general finding as conclusive upon all matters of fact, precisely as the verdict of a jury. Martinton vs. Fairbanks, 112 U. S. 670."

In Dooley vs. Pease, supra, we find this statement:

"Where a case is tried by the court a jury having been waived, its findings upon questions of fact are conclusive in the courts of review, it matters not how convincing the argument that upon the evidence the findings should have been different."

Other quotations to the same general effect as the foregoing could be extracted from the cases cited, but we think the ones given will suffice.

In addition to the cases cited from the supreme court of the United States, holding that the inquiry in cases tried by the court without the intervention of a jury, where the findings are special, prevents any inquiry in this court as to whether the finding is sustained by the evidence, we cite and rely on:

York vs. Washburn, 127 Fed. 564.

Hughes County vs. Livingston, 104 Fed. 306.

Jackson vs. Mutual L. Ins. Co., 186 Fed. 447, 449.

Hill vs. Woodbury, 49 Fed. 138.

Farwell vs. Sturges, 56 Fed. 782; 6 C. C. A. 118.

Reed vs. Stapp, 52 Fed. 641; 6 C. C. A. 244.

Walker vs. Miller, 59 Fed. 867; 8 C. C. A. 331.

Ins. Co. of N. A. vs. Int. T. Co., 71 Fed. 88; 17 C. C. A. 619.

Munchen vs. Hart, 72 Fed. 294; 18 C. C. A. 570.

Woodbury vs. City, 74 Fed. 205.

Randle vs. Barnard, 81 Fed. 682; 26 C. C. A. 568.

Jones vs. McCormick, etc., 82 Fed. 295; 27 C. C. A. 133.

Hartman vs. Montana N. R. Co., 83 Fed. 27.

Hage vs. Magnes, 85 Fed. 355; 29 C. C. A. 564.

Fales vs. N. Y. Life Ins. Co., 98 Fed. 234; 39 C. C. A. 38.

In all these cases from the different circuits it is uniformly held that it makes no difference in the cases tried by the court without the intervention of a jury, even where the findings are special, the appellate court is under Section 700 limited to the inquiry as to "whether the facts found are sufficient to support the judgment." As was well stated in the case of Insurance Co. of N. A. vs. Int. T. Co., 71 Fed. 88:

"When a jury is waived and the court makes a special finding the appellate court cannot look into the evidence except to ascertain whether there was error in admitting or excluding testimony."

And in Munchen vs. Hart, supra:

"The circuit court of appeals has no authority in any case to examine the testimony with a view of determining whether it was sufficient to support a finding of the trial court to which a case has been submitted without a jury."

From Randle vs. Barnard, supra:

"Where there is a special finding of facts, the appellate court will only consider whether upon such facts the judgment was correctly rendered."

In Woodbury vs. City, etc., supra, we find it held that:

"In an action at law tried by the court without a jury, assignments of error which would involve an examination of the evidence cannot be considered by the appellate court."

All the other cases cited by us from the various circuits are precisely to the same effect.

However, it seems that this circuit in the case of Schoenwald vs. Bishop, 244 Fed. p. 715, has held that in cases where a jury has been waived, and the action tried by the court, its inquiry will extend to an examination of the evidence, not for the purpose of determining whether the findings are supported by a preponderance thereof but only

for the purpose of determining whether the findings are supported by *any* evidence.

While we believe that the limitation upon this court's authority is limited to the determination of whether or not the findings made by the trial court support the judgment, we do not shrink from an examination of the record to ascertain whether there is *any* competent evidence to support the findings, and if that examination discloses that the findings are supported by any competent evidence the inquiry is at an end. The only other matter open to review is whether or not any prejudicial error was committed in the reception or rejection of testimony.

Counsel for plaintiffs in error attempt to predicate error upon the refusal of the trial court to make certain findings of fact and conclusions of law proposed by them, but the refusal of the lower court so to do is not subject to exception and review.

Schoenwald vs. Bishop, 244 Fed. 715.

Hathaway vs. First Nat'l Bank, 134 U. S. 494; 33 L. Ed. 1004.

The Francis Wright, 105 U. S. 381, 389; 26 L. Ed. 1100, 1102.

Nashville Int. Car Co. vs. Barham, 212 Fed. 635.

We think it a work of superogation to attempt any review of the testimony upon which the finding of the death of the insured is predicated. We have in our statement of the case quoted freely from the testimony of the various witnesses, and it will perhaps serve no useful purpose to again enter into details. The major question before the court for determination if we accept the rule laid down by this circuit in Schoenwald vs. Bishop, supra, may be thus stated: Is there *any* testimony to support the finding that Frederick L. Stewart, the insured, met his death by drowning in the waters of the Columbia River on the night of March 17, 1921? And, further, is there *any* testimony that proofs of death were presented to the insurance companies prior to the commencement of this action, and were the proofs of death sufficient to enable the companies to consider their rights and liabilities? If it be found from an examination of the record that there is any evidence to sustain these findings, then the inquiry is at an end.

We will discuss theses questions and the question of alleged error in the admission of testimony in the order presented by counsel for plaintiffs in error.

II.

Specifications of error 5 to 18 deal with the question of the sufficiency of the proofs of death submitted by defendant in error to the insurance companies prior to the institution of this action. It is contended by learned counsel for these companies, notwithstanding their explicit admission made on page 16 of their brief, that "at all times plaintiff in error denied liability solely on the ground that Stewart was not dead," that the judgment entered in this action should be reversed because of some alleged insufficiency or defect in the proofs of death. The only authority relied upon by counsel to sustain such a contention is the case of Asbury vs. Saunders, 68 Am. Dec. 300. An examination of the decision in that case discloses that it is without the slightest relevancy and signally fails to touch the precise point here involved.

We agree with the statement excerpted from the case of Crotty vs. Union Mutual L. Ins. Co., 144 U. S. 621, cited on page 15 of counsel's brief that: "sufficiency in form only is admitted by retaining the proofs without objection. The truth of

the statements contained in the proof is not admitted."

But what, may we inquire, has this principle to do with the question under consideration? Counsel leave us in the dark.

There are three all-sufficient answers to the contention that the judgment in these actions should be reversed because of any alleged defect or insufficiency in the proofs of death. They are as follows:

1. The proofs were neither insufficient or defective.

2. The plaintiffs in error waived any right they had to object to the proof of death as insufficient or defective by retaining the same and failing to specifically point out any defect or note any objection thereto.

3. They waived the necessity for submitting any proofs of death whatever by their sustained contention that Stewart is and at all times since March 17, 1921, has been alive.

It is held by all the authorities and denied by none that no particular form of loss under a policy of insurance is required as long as the proof is

sufficient to enable the insurer to consider its rights and liabilities.

O'Brien vs. Ins. Co., 212 Fed. 102.

Lesser vs. N. Y. Life Ins. Co., 200 Pac. 22.

Glazer vs. Ins. Co., 190 N. Y. 6; 82 N. E. 827.

Globe & Rutgers Ins. Co. vs. Prairie Oil & Gas Co., 248 Fed. 452; 160 C. C. A. 462.

Merchants Ins. Co. vs. Ford, 269 Fed. 771.

Neither on the trial below nor in the brief of counsel are we advised in what respect the proofs of death are defective or insufficient. As noted in our statement of the case, the original proofs of death were made out on forms furnished to the defendant in error by the insurance company, and there is no contention that the printed questions contained on those forms were not truthfully, fully and fairly answered. Afterwards the specially prepared affidavits of Mrs. Stewart, the defendant in error, and Paul G. Shotswell, who was the purser on the boat Queen on the night of March 17, 1921, were sent to the insurance companies, and all these documents were kept and retained by them and no objection of any kind ever registered against their form or sufficiency.

What, then, is the rule? Assuming for the sake of the argument that the proofs of death were defective, these companies

"by accepting and retaining proofs which are not such as are required by the contract, the company waives objection thereto."

25 Cyc. 886, note 63.

Under note 63 of the authority just cited we read:

"Notice of objection should be promptly given if the proofs furnished are not such as required." citing Insurance Co. vs. Mahone, 56 Miss, 180; Peacock vs. N. Y. Life Ins. Co., 1 Bosw. (N. Y.) 388; Galdenkirch vs. U. S. Mutual Acc. Assn., 5 N. Y. Sup. 428.

And it is further stated that:

"Requiring further information will be a waiver of defects in other respects in the proofs furnished," citing Standard L. Ins. Co. vs. Davis, 59 Kansas 521, 53 Pac. 856; McElroy vs. Life Ins. Co., 88 Md. 137, 41 Atl. 112, 71 Am. St. Repts. 400.

These latter authorities are peculiarly applicable in the case against the Prudential company, as that company after the receipt of the proofs of death (plaintiff's exhibit 28) requested that the beneficiary forward "specially drawn affidavits"

(plaintiff's exhibit 20), to establish the death of the insured. This, as we have noted in our statement of the case, was done, and thereafter no objection was raised by the company either to the formal proofs of death or to the specially drawn affidavits.

When the specially prepared affidavits of Mrs. Stewart, the defendant in error, were sent to these companies they were accompanied by a letter signed by Mr. Fitch, one of the counsel for defendant in error (see plaintiff's exhibits 25 and 26), in which letters it was stated:

"Complete proofs of loss under the terms of said policy heretofore have been sent you, but if at any time you desire and we can furnish you with any further additional proof or evidence in this matter we stand ready to do so."

Neither the Mutual nor the Prudential saw fit to even answer Mr. Fitch's letter, nor did they demand any other or further additional proof or information. Notwithstanding this fact, counsel for defendant in error afterwards sent the specially prepared affidavit of Paul G. Shotswell to both companies.

In this connection it is well to note that the authorities hold that:

"The assured does not waive a waiver of proofs of loss by afterwards furnishing the proof."

Warshawky vs. Anchor Mut. F. Ins. Co., 98 Iowa 221, 67 N. W. 237.

In Fidelity Phoenix Ins. Co. vs. Sadan, 178 S. W. p. 561, the Texas Civil Court of Appeals, speaking to the question we have been discussing, says:

"We believe that the authorities support the proposition that before an insurance company may defeat a claim for liability for loss because of any inaccuracy or any other defect in the proofs of loss submitted it must point out to the claimant the respects in which it is claimed such proofs are inaccurate and a failure on the part of the insurance company so to do within a reasonable time will constitute a waiver of such alleged defective proof."

See also Wood on Insurance, sec. 452 (2nd Ed.) and authorities cited in note 1, page 962.

In Great American Fire Ins. Co. vs. Jenkins, 76 S. E. at page 160 the Court of Appeals of Georgia says:

"If for any reason the proofs were insufficient or lacking in fulness or in specific compliance with the terms of the policy, the failure of the insurer to object and point out the defects amounted to a

waiver of the right to demand strict compliance with the contract. * * * *"

In Thaxton vs. Metropolitan L. Ins. Co., 55 S. E. 419, the Supreme Court of North Carolina says:

"Defendant's first objection rests upon the allegation that no satisfactory proof of the death of the insured has been made; that the requirements of the policy as to the form and quantum of proof has not been fully complied with. We fail to discover any essential defect in the matter referred to; but if such defect existed we do not think the objection is now open to defendant * * * and as to the form to which this objection is chiefly alleged, it is well established that when proofs of death have been formally made and the company retains them without suggesting any defect or failure in this respect to comply with the requirements of the policy and finally refuse to pay the claim, it thereby waives any defect in the formal proof of death and acknowledges that the requisite proofs were received by it. * * * Here proof of death was made on blanks supplied by the company in July, 1905. So far as the testimony shows no objection or suggestion was made as to the proof until answer filed in November following, denying liability on the policy. * * * * Under such circumstances the objection as to the form of the proof is properly held to be waived."

In Bingell vs. Royal Ins. Co., 87 Atl. at p. 955, the facts disclose that the defendant insurance company kept and retained the proof of loss submitted to them for over one month without making any objection. At the trial it insisted that the proofs were insufficient, but the Supreme Court of Pennsylvania disposed of such contention by cryptly remarking that:

"An insurance company which retains proofs of loss without any objection for over a month will be presumed to have waived defects."
citing many authorities.

In Failes vs. Detroit Fire & Marine Ins. Co., 141 N. W. at 882, the Supreme Court of Michigan says:

"The objection made to the first proofs was general and not specific and plaintiff undertook to and did furnish further proofs of loss which were received by defendant, and no further objection was made that they were unsatisfactory and insufficient in any particulars. By remaining silent and calling for no further information defendant is estopped from claiming upon the trial that these proofs of loss were defective."

In Jones vs. Lumber Ins. Co. of N. Y., 118 S. W. at p. 115, the Supreme Court of Missouri holds:

"If an insurance company is unsatisfied with the proofs of loss furnished by the insured he must

be notified of the company's objection and afforded an opportunity to make corrections if enough time is left of the period in which proof is to be furnished for notice to be given."

In Wakeley vs. Sun Ins. Co., 92 Atl. 137, the Supreme Court of Pennsylvania holds:

"The proofs of loss were delivered to the defendant within the time stipulated in the policy, and as we must assume in good faith as a compliance with the provisions of the policy, and it was the duty of the company to give immediate notice to the assured of its objection to the proofs, pointing out the defects. * * * And if the company neglected to do so its silence will be held a waiver of such defects in the proofs, and they must be considered as and having been duly made according to conditions of the policy. * * * "

From 14 R. C. L. Sec. 523 we excerpt the following:

"Where a policy requires preliminary proofs of loss and they are presented in due time, but are defective, such defects may be waived by the failure of the insurer to object to them on any ground within a reasonable time."

Next we contend that when these companies denied liability, and their counsel admits they did, (brief p. 16) and the uncontradicted testimony is that Mr. Wilton, their agent, endeavored long

before the institution of these actions to induce the Prosecuting Attorney of Cowlitz County to issue a warrant for the arrest of Mr. Stewart, contending that he was alive and presumably engaged in a conspiracy to defraud them, they absolutely waived the necessity for submitting any formal proofs of death whatever. Let it also be noted as we proceed that when these companies filed their answers in these cases they denied on oath that Stewart was dead. Let it also be further noted that the trial court made the following finding of fact:

"That the said defendant * * * thereafter denied that the said Stewart was dead, and by its answer filed herein joined issue with the plaintiff on the allegations concerning the death of the said Frederick L. Stewart." (59,64).

This finding is not excepted to.

There is no principle better settled in the law of insurance than that a denial of liability is a waiver of proofs of loss or proofs of death, as the case may be.

Royal Ins. Co. vs. Martin, 192 U. S. 149, 24 Sup. Co. 247, 48 L. Ed. 385.

Knickerbocker Life Ins. Co. vs. Pendleton, 112 U. S. 696, 709, 5 Sup. Ct. 314, 28 L. Ed. 866, 870.

Fidelity & Cas. Co. of N. Y. vs. Dulaney, 91 Atl. 574.

Price vs. North Am. Acc. Co., 152 Pac. 805.

U. S. Health & Acc. Co. vs Harvey, 129 Ill. App. 104.

Hays vs. Gen. Assembly, 104 S. W. 1141.

Phenix Ins. Co. vs. Kerr, 129 Fed. 723.

Commercial Union vs. King, 156 S. W. 445.

Ins. Co. vs. Forelines, 126 S. W. 719.

Ins. Co. vs. Donelan, 66 Pac. 249, 26 C. J. 407, 409, 410.

In Royal Ins. Co. vs. Martin, 192 U. S. 149, 24 Sup. Ct. 247, 48 L. Ed. 385, the Supreme Court of the United States says:

"A general, absolute refusal to pay in any event or a denial of all liability under its policy of insurance dispensed with such formal proofs as a condition of its liability to be sued and opened the way for a suit by the assured in order that the rights of the parties could be determined by the courts according to the facts as disclosed by the evidence. It was so held by this court in a case of fire insurance (Tayloe vs. Merchants F. Ins. Co.., 9 How. 390, 403, 13 L. Ed. 187, 192) ; *and the same principle was recognized as applicable in a case of life insurance.* (italics ours) Knickerbocker L. Ins. Co., vs. Pendleton, 112 U. S. 696, 709, 28 L. Ed. 866, 870, 5 Sup. Ct. 314. To the same effect are authorities cited by the text writers. * * * *"

It has also been held that a denial of liability, *although first made in the insurer's plea or answer*, constitutes a waiver of notice and proofs or defects therein.

Rochester German Fire Ins. Co. vs. Schmidt, 151 Fed. 681.

Ins. Co. vs. Allis, 53 Pac. 294.

St. Louis Ins. Co. vs. Kyle, 49 Am. Dec. 74.

Ins. Co. vs. Fallon, 63 N. W. 860.

Gash vs. Ins. Co., 153 Ill. App. 31.

Ins Co. vs. Tennant, 144 Ill. App. 30.

Phenix vs. Kerr, 129 Fed. 723.

From 26 C. J. at p. 407, we extract the following:

"It is generally held that a denial of liability or a refusal to pay, not predicated upon the failure to furnish proof, is a waiver of any objection on that ground, irrespective of whether the denial *precedes or follows* (italics ours) the time within which the proofs should have been submitted."

In Knickerbocker L. Ins. Co. vs. Pendleton, 112 U. S. 709, 28 L. Ed. at page 870, we read:

"The preliminary proof of loss or death required by a policy is intended for the security of the insurers in paying the amount insured. If they refused to pay at all, and based their refusal upon some distinct ground without reference to the want or defect of the preliminary proof, the occassion

for it ceases and it will be deemed to be waived. And this can work no prejudice to the insurers, for, in an action on the policy, the plaintiff would be obliged to prove the death of the person whose life was insured, whether the preliminary proof was furnished or not."

III

The next question discussed in the brief of counsel for plaintiffs in error relates to the admission of testimony which is comprehended in specifications of error 1, 2, and 4. To an intelligent understanding of these specifications of error it is necessary to make a peliminary statement.

Mr. Hay, the State Bank Examiner, accompanied Mr. Stewart, the insured, to Portland on the morning of March 17th, 1921. He had been with him almost continuously from March 16th, 1921, at the hour of 9 P. M. to March 17, 1921, at the hour of 10 A. M. He knew Stewart's condition, both physical and mental. When he returned from Portland to Kelso and closed the bank he testified:

"I found in the bank three or four pistols and a sawed off shotgun. I unloaded them.

"Q. Why?

"MR. KEENAN: If the court please, we object to that as wholly immaterial.

"THE COURT: Oh, he may answer. I don't see the materiality of that. He can answer it more quickly than discuss it probably.

"A. I wanted to remove any opportunity that Mr. Stewart might do something rash. I was a little concerned as to what he might do." (85.)

Continuing his testimony, the witness said:

"I worked at the bank until somewhere around 9 o'clock (March 17, 1921) and then went to my hotel. While there George Plamondon called me up and asked me if I would come to his house. I said I would come down if he wanted me to. * * *

"Q. What did you hear? What did he tell you?

"MR. RUPP: Objected to on the ground that it is immaterial.

"THE COURT: Objection overruled. * * *

"A. When I stepped on the porch of Mr. Plamondon's house the door was open, and as I stepped in he said, 'Well, Fred has done it.' I said, 'Did he shoot himself?' And he said, 'No, he went in the river.'" (86.)

Mr. Plamondon testified that he communicated his knowledge of what had happened to Stewart to Mr. Hay immediately after he heard of that event.

The admission of this testimony, excluding the reason assigned by Mr. Hay for unloading the pis-

tols when he closed the bank, can be defended upon the broad proposition that it was a part of the res gestæ. Counsel for the plaintiffs in error contend that it was not a part of the res gestæ because "they (Hay and Plamondon) were miles away, and whatever had occurred had occurred some considerable time before. Their statements were not therefore statements arising from a shock." This, then, is the present objection urged against the admission of the testimony complained of. On the trial the objection to its admission was based upon the ground that it was "immaterial." Such an objection is not well taken.

An objection to evidence that it is incompetent, without stating in what its incompetency consists, is insufficient, and it will not be sufficient to object that evidence is "inadmissible and incompetent," or "immaterial and incompetent," or "immaterial and irrelevant," or "irrevelant and immaterial."

8 Vol. P. & P. 227 and 228.

Objections should always state the grounds thereof, and should present to the court the precise point relied upon by the party objecting. In the language of some of the decisions the party must lay his finger upon the point of objection. He

must not merely complain in a general way and say to let in certain evidence will hurt his case and that under the law it ought to be excluded, and leave the judge and opposite party in the dark as to what principle of law he relies on and compel them to decide haphazard, or else stop the trial of the case while counsel examine the whole body of the law from the earliest judicial exposition down to the latest act of the legislature to see if they can discover any valid objection to the testimony.

8 Vol. P. & P. 218, et seq.

Counsel having objected to the testimony complained of on the sole ground that it was "immaterial" has waived any other objection that might be raised to the same.

Smith vs. Bean, 46 Minn. 138.
Triggs vs. Jones, 46 Minn. 277.
Bailey vs. R. R. Co., 3 S. D. 531.
Ladd vs. Sears, 9 Ore. 244.

Fulton Ins. Co. vs. Goodman, 32 Ala. 108.

However, the statement made by Plamondon to Hay, immediately upon hearing that "Stewart went into the river," was a part of the res gestæ, notwithstanding that they were not present at the place where the event actually occurred. They

were acquainted with many of the facts and circumstances leading up to Stewart's death.

"The term 'res gestæ' has, however, frequently been given a greatly extended application, and has been defined as 'those circumstances which are the undesignated incidents of a particular litigated act and which are admissible when illustrative of such act.' It has been made to embrace all facts which are relevant to the principal fact in any degree, as tending to establish the existence of the claim or liability in dispute between the parties, which directly arises, if at all, from the primary fact, although the facts covered by this extended definition of the phrase may be attendant or explanatory circumstances involving no idea of action, or may be prior or subsequent to the happening of the primary fact, even by a considerable length of time, and although the facts may have happened at a different place from that at which the primary occurrence took place, or the acts may have been done by others than the principal participants."

22 C. J. 443-445.

It is not essential to the admissibility of a statement or act as a part of the res gestæ that it should have been made or done at the place where the principal fact occurred.

22 C. J. p. 458, sec. 456.

Hodges vs. Hale, 161 S. W. 633.

In State vs. Sexton, 149 Missouri 89, 48 S. W. 452, it was held that:

"Declarations of several persons, made when they heard the firing of a revolver, which was the instrument of murder, are admissible as a part of the res gestæ, although they were in a house some distance from the place of murder."

See, also:

Anderson vs. Lush, 202 S. W. 304.

Louisville R. Co. vs. Buck, 19 N. E. 453; 2nd L. R. A. 520.

Leach vs. O. S. L. R. Co., 81 Pac. 90.

Trav. Ins. Co. vs. Mosley, 19 L. Ed. 437; Note 19 L. R. A. at p. 734.

10 R. C. L. p. 980.

Let us assume, however, for the sake of the argument that the evidence complained of was improperly admitted. Still there can be no doubt whatever that it was harmless error. The finding of death does not rest or cannot rest on the admission of this testimony. It would be absurd to contend otherwise. There is a wealth of evidence in the record, unobjected to, upon which that finding is bottomed. On this proposition we quote from 4 C. J. 999-1002, where it is said:

"As a general rule * * * in any case tried by the court without a jury the admission of incompetent evidence is not ordinarily ground for reversal, since it will be presumed, if nothing appears to the contrary, that the judge disregarded such evidence and tried the case on proper testimony only. Thus error in the admission of evidence is not a ground for reversal, if there is sufficient legal evidence to support the judgment or finding, * * * or the case decided on the issue raised without any reference to the evidence improperly admitted. * * * * It is only where the competent evidence fails to support the findings of fact made by the trial court, or where it appears that the court was influenced by the improper evidence, or that appellant was harmed by the error, that the judgment will be reversed."

See, also:

McCaskill Co. vs. U. S., 54 L. Ed. 590.

Mammoth Mining Co. vs. Salt Lake F. Co., 38 L. Ed. 229.

Hinckley vs. Pittsburg Bessemer Steel Co., 30 L. Ed. 967.

Migeon vs. Montana Central R. Co., 77 Fed. 249.

Miller vs. Heuston City S. R. Co., 55 Fed. 366.

Sperry vs. O'Neil, Adams Co., 185 Fed. 231.
Scott vs. McPherson, 168 Cal. 783, 145 Pac. 529.

In Reid vs. Stapp, 52 Fed. 641, 3 C. C. A. 244, it is said:

"Where there is a special finding of facts sufficient to support the judgment, the admission of immaterial evidence not affecting such findings is harmless error."

In Hinckley vs. Pittsburg, Bessemer St. Co., supra, we read:

"The admission of improper evidence on a trial to the court without a jury is harmless, where there is sufficient proper evidence on which to base the decision."

In Lancaster vs. Collins, 115 U. S. 222, 29 L. Ed. 373, it is held that:

"No judgment should be reversed in a court of error when it is clear that the error could not have prejudiced and did not prejudice the rights of the party against whom the ruling was made."

In Hunner vs. Mulcahy, 45 Wash. 365, we read:

"The admission of objectionable evidence on a trial before the court is not reversible error where it would not have changed the result."

Also, in Mitchell vs. Lidgerwood, 50 Wash. 290, 97 Pac. 61, it is held:

"Errors in the admission of evidence in a case tried by the court without a jury, are without

prejudice where there was sufficient competent evidence to sustain the findings."

As such is the universal rule, the subject need not be pursued further.

IV

In opening the discussion upon the proposition of whether or not the evidence is sufficient to justify the finding of death, a proposition with which this court, so we contend, is not concerned, counsel for plaintiffs in error complain that the trial court indulged in the *presumption* that Stewart committed suicide. The trial court did not indulge in any such presumption. Is was unnecessary. The error that counsel have fallen into is plainly manifest from their own statement of the proposition they attempt to maintain. They say:

"It will not, we think, be denied that *when the death is admitted* (italics ours) but the cause thereof is in doubt, whether accident or self-destruction or some other cause, the presumption is all against suicide." (Brief, p. 19.)

Well, we admit that when "the death is admitted *but the cause thereof is in doubt*" the presumption is against suicide. But what application has that rule to the admitted facts in the case at bar? Do

counsel mean to admit that Stewart is dead? If so this controversy ought to cease. The rule that counsel invoke was established to promote justice, not to defeat it. It is all proper enough to be applied in an action on an accident policy of insurance, which by its terms prevents recovery if the insured commits suicide, and the contention of the insurer is grounded on the proposition that death was due to the excepted cause. In the instant case the only question at issue was the question of death, it matters not, so far as the liability of the insurance companies is concerned, whether his death was accidental or suicide. It follows then that the authorities cited by counsel to support the proposition they contend for are without the slightest application to the case at bar, and need not be noticed by us. This was not a case where any presumptions were indulged in by the lower court. The evidence as to the death of the insured was as positive and direct as the circumstances permitted.

Rogers vs. Manhattan Life Ins. Co., 71 Pac. 348 (Cal.).

Fidelity Mut. L. Ins. Co. vs. Metler, 185 U. S. 308, 46 L. Ed. 922.

Western Grain & S. Co. vs. Pillsbury, 159. Pac. 423 (Cal.).

Ins. Co. vs. Moore, 34 Mich. 41.

Coe vs. National Council, etc., L. R. A. N. S. 1915 B 744.

Mutual Life Ins. Co. vs. Stevens, 71 Fed. 258.

In re Miller's Will, 124 N. Y. S. 825.

Insurance Co. vs. Rosch, 23 Ohio (Cir. Ct. R.) 491.

Lancaster vs. Ins. Co., 62 Mo. 121, 17 C. J. 1176.

However, if we correctly understand counsel, they are not contending that there is an absence of any evidence to justify the finding of death, but only that the evidence is insufficient. The argument they indulge in could more properly be addressed to a trial court and not to a court of appeal and error. They argue that Judge Cushman did not find "the fact of death established." With all due deference to learned counsel, we say that Judge Cushman did find that Stewart met his death on the night of March 17, 1921, and words cannot disguise that fact. It is unnecessary to state that Judge Cushman's opinion, setting forth the reasons for his decision, is not a special finding, within the meaning of the Revised Statute, sections 649, 700.

U. S. vs. Sioux City Stock Yards Co., 167 Fed. 126, 92 C. C. A. 578.

But even were the contrary true, that decision finds as a fact that the insured met his death at the time alleged in the complaint. To say that there is no evidence to sustain this finding is to take a position that finds no support in the record. In fact the evidence on this vital issue is overwhelming. It establishes the death of the insured by proof that closely approximates a moral certainty. We doubt that an analysis of the evidence upon which this finding rests will serve any useful purpose, as this court is, if we accept the decision in Schoenwald vs. Bishop, 244 Fed. 715, as the governing rule in this circuit, limited to the sole question of whether or not there is *any* evidence to support the findings which are challenged.

A mere casual reading of the testimony of William Pomeroy, Paul G. Shotswell, John Scanlon, H. L. Curtis, Elmer Schorer, and Stewart's farewell letters to his wife (Pltffs' Exs. 16 and 17), in connection with the admitted fact that the bank, which he had controlled, had closed its doors, that Stewart himself was hopelessly insolvent, that he had used thousands of dollars belonging to the Richter estate, of which he was administrator, together with other circumstances too numerous to mention, suffice to answer the pivotal question. The testimony

of all of these witnesses is uncontradicted and unimpeached. They all appeared in person before the trial court and that court was the final arbiter as to the weight and credibility that should be attached to their testimony. We are not put in the position of asking this court to disregard any of their statements, as are learned counsel for plaintiffs in error when they request this court to disregard the testimony of Walter Comber and John Reid as unworthy of belief.

(In our statement of the case we adverted to the testimony of these two witnesses, not knowing that counsel for plaintiffs in error would of their own motion request this court to disregard their testimony. When counsel wrote their brief they kindly furnished us from time to time with portions of the manuscript copy, and that part of the brief in which they request this court to disregard the testimony of Comber and Reid was not in our hands at the time our statement of the case was prepared, which is now in the hands of the printers.)

As a reason for asking this court to disregard the tesimony of Reid who was their own witness they say the trial court found that he was mistaken when he testified that six passengers got off the steamer Queen when it landed in Kalama on

the night of March 17, 1921. Well, it was also for the trial judge to determine whether or not Elwood, Onorato and others who testified on behalf of the defense were telling the truth, or were mistaken in many of their statements. This function the trial court performed, and when that court came to the conclusion that Elwood and Onorato were mistaken in their statements as to seeing Stewart subsequent to March 17, 1921, it is just as binding on plaintiffs in error as is the finding of the trial court that Mr. Reid was mistaken when he testified that six passengers debarked from the steamer Queen on the night that Mr. Stewart is said to have met his death.

The record discloses a multitude of reasons that moved Mr. Stewart to end his life. It is unnecessary to argue that when his bank was closed by Mr. Hay, the state bank examiner, he found himself in a critical position. He was, according to the testimony of all witnesses who testified upon the subject, in a state of physical collapse. His good name and reputation were gone forever. According to his own statements, contained in plaintiffs' exhibits 16 and 17, he had wrongfully used the moneys of the Richter estate, and he faced prosecuetion on that score. He was without suffi-

cient fortitude to face the future. He was, as testified to by Louis M. Plamondon, president of the Woodland bank:

"a very sensitive man and a man whose chief characteristic was pride. He was very touchy and very proud of his own judgment. He was always right, in business matters particularly. From my observation I would say that he could not meet trouble and disaster very easily. I found that out from previous experiences with him. I might further say that he was not resourceful in meeting trouble. * * *" (178-179.)

Rather illuminating testimony.

It is perfectly plain from the record that Mr. Stewart prior to the failure of the bank had in mind the idea of suicide. After his conference with Mr. Hay in the latter's office in Olympia on March 6, 1921, where his resignation as cashier of the Kelso State Bank was demanded, he read the handwriting on the wall and felt, if he did not know, that financial ruin and all its attendant consequences was fast approaching. This is evidenced by the letter (Pltffs' Ex. 17) that he wrote to his wife after his return from Olympia, and which was found in his private box in the bank after his demise.

"He was," testified his wife, after his return from Olympia, "absolutely a physical wreck." (184.)

When Hay came down to Kelso on the night of March 16, 1921, to close the bank, Stewart had no knowledge of his coming. He was taken by surprise. Carothers, the president of the bank, realized that it was longer useless to keep up the fight to continue the bank's existence, and had without Stewart's knowledge requested Mr. Plamondon to get in touch with Mr. Hay and have him come down, close the bank, and take charge of its affairs. When Mr. Hay arrived in the city on the evening of March 16, 1921, and his presence became known to Mr. Stewart he must have realized the crash which he had dreaded and which he had fought so hard to ward off was at hand. As a last resort he and Mr. Hay went to Portland in a final desperate endeavor to raise funds to tide over the bank's affairs, but were unsuccessful. Hay then returned to close the bank and Stewart commenced preparations to wind up his earthly affairs. He went to the Oregon Hotel and wrote his wife a farewell communication (Pltffs' Ex. 16). He wanted if possible to keep it from becoming known that he had used the funds of the Richter estate, and he directed her, when the insurance money was collected, to reimburse that estate to the end that

he might "keep my record clean." After finishing this communication he wrote to his old friend and former business associate, Judge McKenney, and to Al Maurer and Mr. Crouch, as well, enclosing each a deed to an interest in a tract of land in payment of his obligations to these gentlemen. These deeds it will be remembered were signed by his wife, on the morning he left for Portland. After writing these communications he went to the Union depot at Portland, ostensibly to take a train, and what took place there has been described by Roberts, the porter, and need not be further detailed on these pages. After he left the Union depot we lose sight of him until he boards the train at the North Bank Station about the hour of 6 p. m., the same afternoon. While on that train he is accosted by his friend, Carl Hayes, of Kelso, who attempts to engage him in conversation, but is told that he (Stewart) wants to sleep and to please let him alone. We dare venture to say that sleep did not come to "knit the ravelled sleeve of care." He was torn by conflicting emotions. His natural instinct, his love for his family, bade him live. But disgrace, ignominy, shame and punishment he could not face. It is a lamentable fact that thousands of others have been placed in a like position.

When Mr. Stewart finally arrived at Goble he went to the telephone and called up his home. He inquired of Mr. Sardam, who answered the call "about the little boy Sam, and his wife." He did not dare trust himself to talk to her. His voice, says Sardam, "sounded like he was trying to control it; it was suppressed in some way." After the close of this conversation he went aboard the little ferry boat, Queen. He stood on the prow of that boat in plain sight of Chisholm, Shotswell and Pomeroy, who knew him well, until the boat was equidistant from each shore. The time had come, and the opportunity was at hand. With a quick movement, that was noted by the persons named, he left the prow of the boat, went through the little cabin where were seated or standing Scanlon, Curtis and Schorer, opened the door leading to the small platform on the rear of the boat, and was immediately swallowed up, so we contend, in the waters of that mighty river. The boat made no stops in crossing the river. There were none to make. When the boat landed at Kalama he was of course missing. He never left the boat at the last named place. On this phase of the case the evidence is direct, positive and uncontradicted. Yet learned counsel for the insurance companies ask this court, a court of appeal and error, to enter the field of conjecture

and speculation and conclude that in some mysterious, unknown, unaccountable way he escaped therefrom. We hardly believe that this tribunal will be impressed with such a contention. But, they say, the body was not found, and we reply by pointing to the undisputed testimony which discloses that scores of persons have been drowned in the Columbia River whose bodies were never recovered. We are not to be defeated because we could not produce the dead body. We were not under well established rules of evidence required to prove death by evidence that is clear, cogent and convincing. We proved it in the same way, governed by the same general rules, as we would prove any other issuable fact.

Lancaster vs. Ins. Co., 62 Mo. 121.

Ins. Co. vs. Stevens, 71 Fed. 278.

Davis vs. Briggs, 97 U. S. 628, 24 L. Ed. 1086.

But, argues counsel, the testimony discloses that Mr. Stewart was seen on the streets of Hanford and Pasadena, California, at a date subsequent to March 17, 1921. They addressed that same argument to the trial court, whose province it was to weigh the testimony and determine the credibility of the witnesses, and the argument failed. Not

daunted, they renew it here. Well, if it was the province of this court to weigh conflicting testimony we would have no hesitancy in asserting that this court would undoubtedly arrive at the same conclusion reached by the trial court. George Elwood, the witness who swore that he saw Mr. Stewart on the streets of Hanford, California, on or about March 23 or 24, 1921, either testified falsely or he was very much mistaken in the identity of the person that he said was Mr. Stewart. And what are our reasons for this assertion? First of all we say that it is preposterous to assume that Mr. Stewart, if engaged in an attempt to defraud these insurance companies, would within a few days after his disappearance be seen, undisguised and unconcerned, parading the principal street of Hanford, California, a city of some six thousand souls, when people from all over the state of Washington are constantly thronging that section of the state, and no man from the state of Washington was any better known than Frederick L. Stewart, he having been rather active in the political life of his state, serving several years in the state senate.

Next, let us take note that Mr. Elwood, according to his own statement, had seen Mr. Stewart but twice since 1906, a period of over fifteen years. He

admitted that he did not speak or talk to Mr. Stewart on the occasion referred to. He also admitted that when in Kalama, Washington, in May of 1921, and in the presence of several persons, in Taylor's barber shop, he said he was not sure that it was Stewart he saw in Hanford, California. (270.) Further, Mr. Elwood's testimony that he saw and recognized Stewart in Hanford, California, was thoroughly impeached by proof of his variant statements made to many persons. But the strongest proof that Mr. Elwood did not see Mr. Stewart in Hanford is given by two witnesses who testified on behalf of the insurance companies, Benjamin Vienna and Spiro Papalian. Vienna was shown the old photograph of Stewart and testified that he cut the hair of a customer whose hair was "*practically the same as presented in the picture* * * *." Mr. Papalian, the restaurant keeper out of whose restaurant Mr. Elwood says he saw Stewart emerge, upon being shown the photograph of Stewart that we have referred to, testified that a person closely resembling the person shown in the photograph ate a meal in his place on the 23rd or 24th of March, 1921. When cross-examined Mr. Papalian further testified that the person whose photograph he was attempting to identify had eaten in his restaurant

prior to the 23rd or 24th of March, 1921, and when asked to state the time he said that he was in his restaurant all during the month of February, 1921, but that he went to Stockton, California, during the *first week of March*, 1921, and that the person whose photograph he was attempting to identify had eaten in his restaurant "*before I left.*" Well, when it is recalled that there is no contention that Mr. Stewart was out of the state of Washington prior to March 17, 1921, and when it is further recalled that the testimony is undisputed that Mr. Stewart was in the office of the state bank examiner of Olympia, Washington, on March 6, 1921, and that he was in Kelso, from the time he returned from Olympia until he left for Portland, Oregon, in company with Mr. Hay on the morning of March 17, 1921, the significance of Mr. Papalian's testimony becomes at once apparent. It is therefore too plain for argument that even if Mr. Elwood did see someone on the streets of Hanford, California, on or about March 23rd or 24th, 1921, that he thought was Mr. Stewart, it was simply a case of mistaken identity.

Concerning Vienna's testimony little further need be said. It only remains to be added that Elwood himself admits that when he saw Stewart in 192[illegible]

he had ceased to wear his hair in the manner disclosed in the old photo, and was then wearing it in "pompadour style." (274.) This testimony, taken in connection with the testimony of Mr. Asbury, the barber, is conclusive that the hair of the person Mr. Vienna cut on the 23rd or 24th of March, 1921, was the hair of some person other than Mr. Stewart.

The testimony of Meyer, Hansen and Pooley, captain, mate and purser respectively of the Steamer Mazatlan that sailed from San Pedro, California, about April 3rd or 4th, 1921, deserves but little consideration. Their description of the person they had on board bears but slight resemblance to Mr. Stewart. Each of these witnesses, although they were in contact for a period of seventeen days with the individual they had on board, and who they say resembled to some extent at least the photograph of Mr. Stewart, all testified that they did not observe anything unusual about the mouth or teeth of this individual, while the uncontradicted testimony discloses that the most noticeable thing about Mr. Stewart was his upper teeth, which were unusually long, and with the exception of the three front ones were all gold crowned, and that his mouth was so formed that even in casual conversation all of his teeth came at once into view.

Dr. Barnard, Stewart's dentist, testified:

"Do you suppose, Doctor, from your knowledge of Fred Stewart's teeth and his mouth, and the peculiarities that you have destribed, that a person could be with him for seventeen days, sit at the same table and eat with him, drink with him, and play poker with him, around a small deal table, and not notice those teeth?

"A. Absolutely not." (318.)

The Steamer Mazatlan landed at Manzanilla, Mexico, on April 20, 1921. Yet the defense produced the witness Onorato, a temperamental young Italian, who testified that on April 26, 1921, about the hour of noon, while driving through the streets of Pasadena, California, he observed a person on one of the streets of that city who he thought was Mr. Stewart. Well, if it was Stewart who was on board the steamer Mazatlan, fleeing to Mexico to hide himself in the wilds of that country, why would he on leaving the boat at Manzanilla hot-foot it back to Pasadena, California, and arrive there just in time to be seen by Onorato at noon on April 26, 1921? Will learned counsel for the insurance company enlighten us on this point? The evidence leaves it very doubtful as to whether or not a person landing at Manzanilla, Mexico, on April 20, 1921, could reach Pasadena, California, by April 26, 1921.

We rather think that the witness Moores intended to so testify, but in his cross-examination he says:

"From Manzanilla to El Paso is between 1,500 and 1,600 miles. They are making this run now in four days easily." (309.)

On his direct examination he had testified that a person leaving Manzanilla, Mexico, on April 20, 1921, could reach Los Angeles in four days, sixteen hours. The two statements are in direct conflict. If it takes four days to make the trip from Manzanilla, Mexico, to El Paso, Texas, then we are at a loss to know how the journey from El Paso, Texas, to Los Angeles, California, could by using the ordinary methods of travel, be completed in sixteen hours. However, we confidently submit that a reading of the testimony of Mr. Onorato leaves it exceedingly doubtful as to whether he was in Pasadena, California, on April 26, 1921. But no useful purpose will be subserved by entering into an analysis of the testimony of this witness. When Mr. Onorato returned to Kelso in May of 1921, just a few days after he says he saw Mr. Stewart on the streets of Pasadena, he told Mr. Robb, a resident of that city, and he so admits, that he would not swear that the person he saw on the streets of Pasadena was in fact Stewart. He also admits that

he refused to make an affidavit at the request of Judge McKenney, administrator of Stewart's estate, that it was Stewart he observed at that time. However, like Mr. Elwood, he changed his mind when Mr. Wilton, the agent of the insurance companies, interviewed him.

Counsel for plaintiffs in error having requested this court to disregard the testimony of Comber, who testified that he saw Stewart on the streets of Pasadena, California, in August, 1921, and having admitted that Judge Cushman's finding that the witness Reid, when he testified that six passengers left the boat Queen when it landed at Kalama, Washington, on the night of March 17, 1921, was mistaken, makes unnecessary any attempted analysis of their inherently improbable statements.

Counsel find themselves taking inconsistent and vacillating positions. They contend that Stewart was the person that left the Steamer Mazatlan at Manzanilla, Mexico, on April 20, 1921; they then contend that it was Stewart whom Onorato saw in Pasadena on April 26, 1921; that it was Stewart who ate a meal in Papalian's restaurant in Hanford, California, on March 23rd or 24th, 1921, when Papalian, their own witness, affirms that the same person who partook of a meal in his res-

taurant on the date mentioned and who he said resembled the photograph shown him (Deft's Ex. "C," duplicate of Ex. "T") took two or three meals in his restaurant *prior to the first Saturday* in March of 1921.

It is useless to pursue the subject further. We submit that the findings excepted to are supported by a wealth of testimony, and that no reversible error was committed in the admission or rejection of evidence, and that the judgment should stand affirmed.

Respectfully submitted,

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